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IN THE

Supreme Court of the United States

October Term, 1956.

No. 355

MELROSE REALTY CO., INC.

Petitioner,

v.

LOEW'S INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R. K. O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, Individually and Formerly Trading as the GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION and WARNER BROS. THEATRES, INC., Now Known as WARNER THEATRES, INC.,

Respondents.

PETITION OF MELROSE REALTY CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. .

MELROSE REALTY CO., INC.,
Petitioner,

v.

LOEW'S INCORPORATED, ET AL.,
Respondents.

PETITION OF MELROSE REALTY CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, MELROSE REALTY CO., INC., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 31, 1956, in the case of MELROSE REALTY CO., INC., Appellant v. LOEW'S INCORPORATED, et al., Docket No. 11,760, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Third Circuit be reversed by this Honorable Court and the petitioner granted such other relief as this Court may deem proper. Your petitioner respectfully represents:

I. OPINIONS IN THE COURTS BELOW.

The District Court of the United States for the Eastern District of Pennsylvania granted Defendants' Motion for Summary Judgment and entered judgment against Plaintiff on September 12, 1955. Chief Judge William H. Kirkpatrick wrote an opinion which was filed on September 12, 1955. That opinion, which is unreported, is appended.

The Court of Appeals for the Third Circuit filed a per curiam opinion on May 31, 1956, affirming the judgment of the District Court.

A per curiam opinion denying Plaintiff's Petition for a Rehearing was filed on July 12, 1956, Chief Judge John Biggs, Jr., dissenting. These opinions, which are unreported, are appended.

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION IS INVOKED.

A. The Court of Appeals for the Third Circuit entered judgment on May 31, 1956, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. This judgment is sought to be reviewed.

B. The Court of Appeals for the Third Circuit denied Plaintiff's Petition for a Rehearing on July 12, 1956. There was no order granting an extension of time within which to petition for certiorari.

C. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Act of June 25, 1948, c. 646; 62 Stat. 928; 28 U. S. C. Sec. 1254.

III. THE QUESTION PRESENTED FOR REVIEW.

Is a landlord, who has leased a theater under a percentage lease agreement a person "injured in his business or property" under the Sherman and Clayton Anti-Trust Acts, where a conspiracy in restraint of trade has substantially reduced the gross receipts upon which the landlord's percentage rentals are based, and where the tenant is a party to the conspiracy.

IV. THE STATUTE INVOLVED IN THE CASE.

This proceeding concerns the interpretation of Section Four of the Clayton Anti-Trust Act, Act of October 15, 1914, c. 323, Sec. 4; 38 Stat. 731; 15 U. S. C. Sec. 15, which reads as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

V. STATEMENT OF THE CASE.

This case seeks an authoritative definition of Section 4 of the Clayton Anti-Trust Act as to who is a ". . . person . . . injured in his business or property . . ." and therefore entitled to bring a private anti-trust suit under that section.

Plaintiff, MELROSE REALTY CO., INC. is the owner of the Yorktown Theatre, which it leased to defendant, WARNER BROS. THEATRES, INC.[1] The lease agreement provided

1. Now known as Warner Theatres, Inc.

for rent in the form of a fixed minimum plus a percentage of gross receipts. In its complaint, plaintiff alleged a conspiracy in restraint of trade between its lessee and the other defendants, which are various producer-distributors and exhibitors of motion pictures. This conspiracy, plaintiff alleged, resulted in a substantial reduction in the gross receipts of the Yorktown Theatre and a corresponding decrease in plaintiff's percentage rental income based on these receipts. Plaintiff claimed treble damages against the conspirators as provided by the Clayton Act.

Prior to trial, the defendants moved for Summary Judgment on the Pleadings. The District Court for the Eastern District of Pennsylvania granted judgment for the defendants on the ground that plaintiff was not a person ". . . injured in his business or property . . ." within the protection of the Clayton Act. The United States Court of Appeals for the Third Circuit affirmed that judgment. Plaintiff then petitioned that court for a re-hearing, but it was also denied.

Chief Judge Biggs dissented from the denial of a rehearing on the ground that the plaintiff-lessor had suffered a direct injury of a type requiring the protection of the Clayton Act.

At this stage of the case, the existence of a conspiracy among the defendants must be taken as admitted. Furthermore, the allegations of plaintiff's complaint are corroborated by the deposition of Lester Krieger, Assistant Zone Manager of defendant Warner Bros. Circuit Management Corporation, (now Stanley Warner Management Corporation). The facts supported by the complaint and deposition are as follows:

Prior to November 30, 1950, the Yorktown Theatre enjoyed a "key run" in the northern suburbs of the City of Philadelphia, under which it was permitted to show pictures produced and distributed by various defendants twenty-eight days after the close of these motion pictures in the center city theatres.

In January of 1949, a suit was filed in Federal Court by Dante Iacampo against the various defendants who were and are engaged in the distribution of motion pictures for the Philadelphia area. This suit sought to obtain for the Glenside Theatre (owned then by Iacampo, and now by defendant Glenside Theatre Corporation) a key run equivalent of that enjoyed by the Yorktown Theatre. Prior to this time, the Glenside Theatre did not enjoy a key-run status. The Glenside Theatre and the Yorktown Theatre are located in the same general area and are therefore in competition with each other.

In order to dispose of the Iacampo suit, Mr. Krieger suggested that the defendants agree with Iacampo and the officers of the Glenside Theatre Corporation (which succeeded Iacampo as owner and operator of the Glenside Theatre) whereby the Glenside Theatre would be advanced to a key run and given the right to exhibit the same pictures as shown at the Yorktown Theatre on a day and date basis, which meant that the same picture would be shown at both theatres at the same time.

Mr. Krieger and the defendants were apparently aware that if the Glenside Theatre was in competition with the Yorktown Theatre, such an agreement would be in restraint of trade and consequently illegal. They therefore proposed that the day and date arrangement be instituted for a six-month trial period, and if competition were shown by a decrease in business of the Yorktown Theatre, the arrangement be discontinued.

Mr. Krieger and the defendants were also aware that such an agreement would directly and immediately affect the Melrose Realty Co., lessor of the Yorktown Theatre, since its rental was partly based on a percentage of that theater's gross receipts. Accordingly, they contacted Mr. Charles Kahn, President of the Melrose Realty Co., and explained the proposed agreement to him. Mr. Kahn had no doubt that the theaters did in fact, compete, but agreed

on a six-month trial experiment to establish that fact beyond question.

The day and date experiment hurt the receipts of the Yorktown Theatre badly, resulting in a substantial diminution of the percentage rentals received by the plaintiff under its lease. These results clearly established that the two theaters were in competition.

Mr. Kahn, both before and since the expiration of the six-month experiment has repeatedly complained to the defendants, and repeatedly demanded that the experiment be ended as agreed. Despite plaintiff's demands, defendants have persisted in their illegal agreement to the substantial injury of plaintiff.

VI. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

This action was initiated before the United States District Court for the Eastern District of Pennsylvania, which had jurisdiction over the matter based on Section Four of the Clayton Anti-Trust Act, Act of October 15, 1914, c. 323, Sec. 4; 38 Stat. 731; 15 U. S. C. Sec. 15, and pursuant to the Act of June 25, 1948, c. 646; 62 Stat. 931; 28 U. S. C. Sec. 1337.

VII. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

This case presents an important question of Federal Law under the Clayton Anti-Trust Act which has not been, but should be, settled by this Court, as to whether Plaintiff, which leased a theater partly in return for a percentage of the lessee's receipts, is a "person . . . injured in his business or property" under the Clayton Act, especially where Plaintiff's lessee was a party to the illegal conspiracy.

VIII. ARGUMENT.

A. The Anti-Trust Status of the Treater Lessor Is of Importance to the Industry and to the Effective Enforcement of the Anti-Trust Laws.

The nature of the motion picture theater industry is such that, generally, motion pictures are exhibited by large operating companies which lease the theaters in which they exhibit. Not infrequently the lease is set up on the basis of a minimum rent, with a percentage of the lessee's receipts as an additional payment of rent.

The practical result of this type of leasing arrangement is to make the landlord vitally interested in the successful operation of the theater. If the lessee's business suffers, the landlord's rentals suffer. If a conspiracy is aimed at the lessee, it points at the landlord no less.

It is not surprising, therefore, that there have recently been an increasing number of cases in which landlords have attempted to attack illegal restraints of motion picture trade, and to recover their resultant losses, by means of treble damage action.[2]

Chief Judge John Biggs, Jr., in dissenting from the denial by the Court of Appeals of Plaintiff's Petition for Rehearing in the instant case recognized this question to be an "important issue" and stated that

> "The Lessor suffers property damage because of the . . . conspiracy and that injury is direct and not remote".

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2. *Camrel Co., Inc. v. Paramount Film Distributing Corp.*, CCH Trade Reg. Rep. 1944-47 Ct. Dec. ¶ 57,233 (S. D. N. Y., 1944); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa., 1953), 211 F. 2d 405 (1954), *cert. den.* 348 U. S. 828 (1954); *Essaness Theatres Corporation v. Balaban & Katz Corp.*, 1955 Trade Cases ¶ 68,152 (N. D. Ill., 1955); *Walder v. Paramount Publix Corporation*, 1956 Trade Cases ¶ 68,275 (S. D. N. Y., 1956); *Erone Corporation v. Skouras Theatres Corporation*, 1956 Trade Cases ¶ 68,299 (S. D. N. Y., 1956); *Steiner v. 20th Century-Fox Film Corportion*, 1956 Trade Cases ¶ 68,304 (S. D. Calif., 1956).

The policy behind allowing private actions under the Sherman and Clayton Acts is two-fold; to compensate persons injured by an illegal conspiracy, and to aid in the enforcement of the public interest in keeping commercial enterprise free from collusive monopolization.

To deny an injured Lessor the right to sue is to nullify both policies. It substantially reduces the number of persons who would be zealous in attacking restraints of trade which clog free competition. And it denies any remedy whatsoever to a party directly injured by that restraint.

These implications obtain heightened significance when, as here, the operating lessee is a party to the conspiracy. In such a situation, denying the lessor's right to sue may completely eliminate any possibility of private anti-trust enforcement. It guarantees to an illegal conspiracy of motion picture distributors immunity from private attack if the theater lessee can be persuaded to join in the restraint.

B. The Confusion of Judicial Authorities Concerning the Anti-Trust Status of a Percentage Lease Landlord Compels Clarification by This Court.

While the growing case law concerning the anti-trust status of a percentage lease landlord attests the significance of that question, those judicial decisions are in confusion as to its proper resolution. Not only are the decisions often contradictory among themselves, but they are frequently inconsistent with the principles governing what parties have standing to bring private anti-trust suits, as enunciated by the main-stream of judicial authority on the subject.

1. The Decisions Construing the Anti-Trust Status of the Percentage Lease Landlord Are in Direct Conflict.

The cases of *Camrel Co., Inc. v. Paramount Film Distributing Corp.*, CCH Trade Reg. Rep. 1944-47 Ct. Dec. ¶ 57,233 (S. D. N. Y., 1944) and *Harrison v. Paramount*

Pictures, Inc., 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd.* 211 F. 2d 405 (1954), *cert. den.* 348 U. S. 828 (1954) are irreconcilable. Both cases concern lessors who had rented on a percentage lease basis. Yet although both plaintiffs were identically situated, in the *Camrel* case the court held that the lessor had an interest protectable under the Clayton Act, while the *Harrison* case decided that the lessor had an interest too remote for such protection.

Moreover, courts have frequently based their decisions on whether a landlord with a percentage lease could bring a treble damage suit or not on a variety of factors which have yielded diverse results.

In *Steiner v. 20th Century Fox Film Corp.*, 1956 Trade Cases ¶ 68,304 (S. D. Calif., 1956) it was held that the plaintiff-lessor had a protectable interest because she had had *direct dealings* with the defendants. Also, in *Essaness Theatres Corp. v. Balaban & Katz Corp.*, 1955 Trade Cases ¶ 68,152 (N. D. Ill., 1955), defendant moved to dismiss as to the lessor-plaintiff, but the court denied the motion partly on the ground of direct dealings between the lessor and the conspirators.

It is not clear why these direct dealings give such a plaintiff any increase in rights. It could not be that the court was requiring a conspiracy to be directly aimed at injuring a given plaintiff, for the cases of *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942) and *McWhirter v. Monroe Calculating Machine Company*, 76 F. Supp. 456 (W. D. Miss., 1948) hold that a salesman can recover for loss of commissions on business stifled by a conspiracy even though that conspiracy was not directly aimed at him. More probably the direct dealings were strong proof of the fact that plaintiff was in a position different from that of the public. At any rate, had the "direct dealings" test been applied to the instant case, plaintiff would have been entitled to Clayton Act protection. This was recognized by Chief Judge John Biggs, Jr.

in his dissent from the denial of plaintiff's Petition for Rehearing by the Court of Appeals.

Courts have also denied a landlord the right to Clayton Act protection where the landlord and the lessee were corporations owned by the same stockholders. These decisions appear to be based on the concept of avoiding double compensation. Apparently it is felt that, in such a situation, recovery by the lessee will also include recovery on behalf of the lessor. Thus, in *Walder v. Paramount Publix Corp.*, 1956 Trade Cases ¶ 68,275 (S. D. N. Y., 1956) the court dismissed the claims of the landlord corporation. On page 71,263, the court distinguished the *Camrel* case, *supra*, on the ground that in that case there was a complete separation of landlord and lessee interests, whereas in *Walder* the same group of stockholders owned both the landlord and lessee corporation. Similarly, in *Westmoreland Asbestos Co. v. Johns Manville Corporation*, 30 F. Supp. 389 (S. D. N. Y., 1939), the landlord corporation was denied the right to bring suit where the lessee corporation was also suing and where the landlord and lessee corporations were both owned by the same stockholders.[3]

In contrast with the above decisions, in one case it was held that a landlord was entitled to sue partly on the basis that the landlord and lessee were owned by the same stockholders. In *Essaness Theatres Corp. v. Balaban & Katz Corp.*, 1956 Trade Cases ¶ 68,158 (N. D. Ill., 1955) the court denied a motion to dismiss a lessor's treble damage action on the ground that certain factors distinguished that claim

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3. This same rationale explains the case of *Productive Inventions Inc. v. Trico Products Corporation*, upon which respondents have relied heavily below. That case did not concern a theater lessor. Rather, the action was brought by a patentee which had leased its patents on a royalty basis, against an illegal conspiracy which had reduced its licensee's sales. The District Court dismissed the action, emphasizing that both the patent licensor and the licensee were almost entirely owned by the same stockholder. The decision was affirmed on appeal to the Circuit Court of Appeals for the Second Circuit, 224 F. 2d 678 (1955) *cert. den.* 350 U. S. 936 (1956).

from the *Harrison* case. One of the factual distinctions so stressed was that the landlord-claimant was a corporation wholly owned by the same families which owned the lessee-theater operator, so that the lessor corporation had *more* of an interest in business.

Thus, it becomes clear that the various lower courts of the country are in utter confusion as to the anti-trust status of a percentage lease landlord and in complete disharmony as to the objective tests to be applied in resolving this question.

2. The Broader Judicial Principles Governing the Clayton Act Protection Are Violated by Those Cases Denying Protection to Percentage Lease Landlords.

As early as 1906, this court, in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), stated that Congress had intended to allow treble damage recovery not only for injuries to property, but also to any person injured in his business or property, a much broader concept. Furthermore, the decision of the Court of Appeals in that case, 127 Fed. 23, 27-28, declared that a liberal definition of the types of injury for which anti-trust remedy was available was required by the ". . . wide economic purposes of Congress, as manifested in the Act."

Lower courts, following the principle of liberal definition enunciated by this court, have consistently awarded Clayton Act protection to rights less direct and more remote than the lessor's right to receive a percentage of his lessee's gross receipts. Thus, it has been held that a plaintiff need not stand in a contractual relationship with defendant in order to have a protectable property interest. In *Vines v. The General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir., 1948) the court stated:

> ". . . it has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer. . . ."

An extremely speculative interest was granted anti-trust protection in *Moore v. Backus*, 78 F. 2d 571 (7th Cir., 1935), cert. den., 296 U.S. 640 (1935). There, a futures speculator had "sold short" in the hope that the futures market would drop. Defendants cornered that market, thus maintaining a higher price level. It was held that plaintiff's expectation that prices would fall was a property interest which had been injured, within the contemplation of the Clayton Act.

Similary, courts have consistently held that the right to enter a business is a property right protectable under the Anti-Trust laws. In *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (2d Cir., 1908), a steamship conference had excluded plaintiff from active competition. The court stated on Page 253 that whether the conspiracy was entered into before or after plaintiff commenced business was irrelevant, because the Sherman Act protects the right to enter a business. The same holding is to be found in *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed, 254 (2d Cir., 1908) and *Goldman Theatres v. Loew's Inc.*, 150 F. 2d 745 (3rd Cir., 1945), and 69 F. Supp. 103, 105 (E. D. Pa., 1946).

Furthermore, courts have accorded Clayton Act protection, as property interests to salesmen's rights to percentage commissions compellingly similar to plaintiff's right to a percentage rental. In *McWhirter v. Monroe Calculating Machines Co.*, 76 F. Supp. 456, 460 (W. D. Miss., 1948), plaintiff was the sales manager of one of two defendant companies. He was paid a commission based on sales made by him and by members of his sales staff. Plaintiff alleged that violation of the Robinson Patman Act had hampered his selling and thus decreased his commissions. The court held that since plaintiff was prevented from making sales as a result of the violation, he was thereby damaged within the provisions of the Clayton Act.

Similarly, in *Roseland v. Phister Manufacturing Co.*, 125 F. 2d 417 (7th Cir., 1942), plaintiff was the exclusive

sales agent for the Phister Company, which had conspired with the other two defendants to restrain trade. Plaintiff had been receiving a percentage of all sales or deliveries within his territory. The court held that plaintiff had sustained injury to a protectable property interest, saying: "We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy." See also, *Klein v. Sales Builders, Inc.*, 1950-1951 Trade Cases ¶ 62,600 (D. C. Ill., 1950); *cf. Vines v. The General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir., 1948).

Thus, those decisions denying a threater lessor with a percentage lease anti-trust standing run counter to the mainstream of judicial decisions which indicate that such a lessor is well within the group of persons whose injuries are recoverable under the Clayton Act.

Finally, to the extent that court decisions calling the lessor's injury too "remote" for Clayton Act protection are based on the speculativeness of damages, they are in conflict with *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946). The principle there enunciated by this Court is that courts should not deny anti-trust relief where any injury can be proven. Other decisions have recognized that anti-trust cases require more liberal rules regarding proof of damages. *Finley v. Music Corporation of America*, 66 F. Supp. 569, 571 (S. D. Calif., 1946).

In any case, a theater lessor's injuries are direct and his damages provable. The defendant's conspiracy reduced the lessee's gross receipts, and thereby directly reduced the lessor's rentals based on a percentage of those receipts. The percentage lessor's injuries are clearly less "remote" and his damages more readily established than the loss of potential profits of an entrant into a new business, or the loss of potential commissions of a salesman on sales which he *might* have made but for the restraint of trade.

The foregoing resumé would seem to indicate clearly that the authorities concerning the right of a theatre lessor

to Clayton Act protection, and the principles governing that right are in a state of confusion. In view of the real importance of this question to the many theater landlords renting under percentage leases whose interests may be imperiled by illegal restraints of competition; in view of the importance of this question to the effective enforcement of the anti-trust laws; in view of the increasing litigation on this question; and in view of the unsettled and contradictory status of the present judicial authorities, it is urged that this court grant this petition for a writ of certiorari in this case in order to clarify the principles which should govern a theater lessor's right to Clayton Act protection.

Respectfully submitted,

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OPINION RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 13,228.

MELROSE REALTY CO., INC.

v.

LOEW'S INCORPORATED, ET AL.

Before HON WILLIAM H. KIRKPATRICK, *J.*

Philadelphia, Pa., Monday, September 12, 1955.

THE COURT: I will enter the summary judgment for which the defendant moves.

If I were entirely free I would still follow the views that I set forth in my opinion in the Harrison case, but the Court of Appeals has acted upon it and it is now the law of this Circuit and it is not my province to change it.

It is a familiar principle that where there are two issues involved, either one of which would support the decision of a court, and the court rules upon both of them, it establishes the law as to both those points. In the Court of Appeals in the Harrison case the court specifically referred to the fact that this court considered and disallowed the plaintiff's contention that she was ". . . a person injured, and therefore entitled to sue, under the Clayton Act even though she was a non-operating theatre owner."

That is a quotation from the Court of Appeals opinion, so that they had that issue directly before them, whatever other issues they had. And the Court went on to say that "All of the foregoing contentions were presented to the district court. . . . They were all fully considered and correctly decided. . . . We find ourselves in complete accord with his reasoning and conclusions and need add nothing thereto."

Therefore, the law of this Circuit is settled and I cannot find any substantial difference in the various distinctions cited by counsel for the plaintiff which go to this point. There may be some slight distinctions in the nature of the case and the relationship of the parties, but that is not the point of the case. The point of the case was that the non-operating theatre owner, who hasn't been deprived of her lease, whose tenant is still in business, carrying out his obligations as to the rent and paying the minimum rent that he was always required to do; that such a theatre owner is simply not a person within the purview of the anti-trust laws, not a person injured in his business within the meaning of the Clayton Act.

MR. ROSENBLUTH: If Your Honor please, may I have an exception to your ruling?

THE COURT: Oh, certainly.

OPINION OF THE COURT

(Filed May 31, 1956)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,760

MELROSE REALTY CO., INC.,
Appellant

v.

LOEW'S, INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R.K.O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, INDIVIDUALLY AND FORMERLY TRADING AS THE GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION AND WARNER BROS. THEATRES, INC., NOW KNOWN AS WARNER THEATRES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 22, 1956

Before MARIS, MCLAUGHLIN and HASTIE, *Circuit Judges.*

PER CURIAM:

This is an appeal by the plaintiff from a summary judgment entered by the district court in favor of the defendants in a private antitrust suit. The plaintiff is the owner of the Yorktown Theatre. One of the defendants is the lessee-operator of the Yorktown Theatre. Another is the operator of a neighboring theatre, the Glenside Theatre, another is a motion picture exhibitor, and the others are motion picture distributors and a service company for two of the defendants. The complaint alleged a conspiracy by the defendants in settlement of an antitrust suit brought by the former operator of the Glenside Theatre to permit it to have a key-run of motion pictures equivalent to that enjoyed by the Yorktown Theatre. This, it was averred, resulted in decreased receipts by the Yorktown Theatre which in turn resulted in diminished percentage rentals received by the plaintiff under its lease. Treble damages were claimed.

The district court entered judgment for the defendants upon the authority of Harrison v. Paramount Pictures, Inc., 1954, 211 F. 2d 405, cert. den. 348 U.S. 828. In that case we affirmed a well considered opinion by Chief Judge Kirkpatrick (115 F. Supp. 312) holding, inter alia, that a non-operating lessor-owner of a motion picture theatre who is entitled to rental based on a percentage of receipts is nonetheless not a "person injured in his business or property" within the meaining of section 4 of the Clayton Act and, therefore, is not entitled to bring suit under the Act for an alleged conspiracy relating to the licensing of pictures at the theatre by the lessee-operator. The rule thus laid down is sound and we adhere to it. It compelled the entry of judgment for the defendants in this case.

The judgment of the district court will accordingly be affirmed.

OPINION OF THE COURT

(Filed July 12, 1956)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,760

MELROSE REALTY CO., INC.,
Appellant

v.

LOEW'S INCORPORATED; ET AL.

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges*.

PER CURIAM:

In a petition for rehearing the plaintiff reiterates its arguments that the case is distinguishable from Harrison v. Paramount Pictures, Inc., 3 Cir. 1954, 211 F. 2d 409, cert. den. 348 U.S. 828, and that in any event that case was wrongly decided by us and should be overruled. We adhere to the rule laid down in the Harrison case. We think that it is a sound rule and that it is applicable to this case. Accordingly the petition for rehearing will be denied.

BIGGS, *Chief Judge*, dissenting.

In affirming the decision of the court below, this court has adhered to the principle expressed in Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 316-317 (E.D. Pa. 1953), and 211 F. 2d 405 (3 Cir. 1954), that the lessor of a motion picture theatre, who receives as part of his rent a percentage of admission fees, cannot maintain a suit against its lessee under Section 4 of the Clayton Act, 15 USCA § 15, despite the fact that the lessee has conspired against it in violation of the antitrust laws and, in furtherance of the conspiracy, has agreed to show third-run pictures with consequent lower admission fees and lower rent. Recovery is denied the lessor on the ground that it does not possess a property interest cognizable under Section 4 and that the injury to the lessor's property right is too "remote" to give it *locus standi*.

The lessor suffers property damage because of the illegal act of the lessee arising out of the conspiracy and that injury is direct and not remote. The lessor should receive the protection of the Clayton Act. See Steiner v. 20th Century-Fox Film Corp. F. 2d (9 Cir. March 15, 1956).[1] Cf. Hempstead Theater Corp. v. Metropolitan Playhouse, 308 N. Y. 712, 124 N.E. 2d 332 (1954) and Vines v. General Outdoor Advertising Co., 171 F. 2d 487 (2 Cir. 1948).

I am of the view that this court sitting en banc should review the very important issue presented. For that reason I dissent from the denial of rehearing.

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1. The Court of Appeals for the Ninth Circuit distinguished the Harrison decisions, 115 F. Supp. 312 and 211 F. 2d 405, on the ground that "there were no direct dealings between plaintiff and defendant . . ." but the record does not support such a view for the lessee in Harrison was alleged to be one of the co-conspirators.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,760

MELROSE REALTY CO., INC.,
Appellant,

v.

LOEW'S INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R.K.O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; WARNER BROS. THEATRES, INC., now known as WARNER THEATRES, INC.; DANTE IACAMPO, individually and formerly trading as the GLENSIDE THEATRE; and GLENSIDE THEATRE CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: MARIS, MCLAUGHLIN and HASTIE, *Circuit Judges*.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest: IDA O. CRESKOFF,
Clerk.

May 31, 1956.

FILED
AUG 29 1956
JOHN T. FEY, Clerk

No. 355

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,760.

MELROSE REALTY CO., INC.,
Appellant,

v.

LOEW'S, INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R. K. O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, Individually and Formerly Trading as the GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION and WARNER BROS. THEATRES, INC., Now Known as WARNER THEATRES, INC.

Appeal from a Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

Brief for Appellant and Appendix.

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STATEMENT OF THE QUESTION INVOLVED.

Is a landlord, who has leased a theater under a percentage lease agreement, a person "injured in his business or property" under the Sherman and Clayton Anti-Trust Acts, where a conspiracy in restraint of trade has substantially reduced the gross receipts upon which the landlord's percentage rentals are based and where the tenant is a party to the conspiracy.

STATEMENT OF THE CASE.

This appeal is from a decree granting defendants' Motion for Summary Judgment and dismissing plaintiff's complaint. Plaintiff, Melrose Realty Co., Inc., is the owner of the Yorktown Theatre, which it had leased to defendant Warner Bros. Theatres, Inc.* The lease agreement provided for rent in the form of a fixed minimum plus a percentage of gross receipts. In its complaint, plaintiff alleged a conspiracy in restraint of trade between its lessee and the other defendants, which are various producer-distributors and exhibitors of motion pictures. This conspiracy, plaintiff alleged, resulted in a substantial reduction in the gross receipts of the Yorktown Theatre and a corresponding decrease in plaintiff's percentage rental income based on these receipts. Plaintiff claimed treble damages against the conspirators as provided by the Anti-Trust Acts. The lower court dismissed the complaint on the ground that plaintiff was not a person ". . . injured in his . . . property . . ." within the protection of the Clayton Act.

For the purposes of this appeal, the existence of a conspiracy among the defendants must be taken as admitted.

Prior to November 30, 1950, the Yorktown Theatre enjoyed a "key run" in the northern suburbs of the City of Philadelphia, under which it was permitted to show pictures produced and distributed by various defendants twenty-eight days after the close of these motion pictures in the center city theatres.

In January of 1949, a suit was filed in Federal Court by Dante Iacampo against the various defendants who were and are engaged in the distribution of motion pictures in the Philadelphia area. This suit sought to obtain for the Glenside Theatre (owned then by Iacampo and now by de-

* Now known as Warner Theatres, Inc.

fendant Glenside Theatre Corporation) a key run equivalent to that enjoyed by the Yorktown Theatre. Prior to this time the Glenside Theatre did not enjoy a key-run status. The Glenside Theatre and the Yorktown Theatre are located in the same general area and are therefore in competition with each other.

In order to dispose of the Iacampo suit, all of the defendants entered into an agreement with Iacampo and the officers of the Glenside Theatre Corporation (which succeeded Iacampo as owner and operator of the Glenside Theatre) whereby the Glenside Theatre was advanced to a key run and given the right to exhibit the same pictures as shown at the Yorktown Theatre on a day and date basis, which meant that the same picture was shown at both theatres at the same time.

The day and date policy established by all of the distributors at the settlement of the Iacampo suit had a substantially adverse effect upon the gross receipts of the Yorktown Theatre, resulting in a substantial diminution of the percentage rentals received by the plaintiff under its lease, and the Yorktown Theatre notified the distributors of such fact and demanded that the day and date policy be abandoned. Despite such demands the defendants have persisted in their illegal agreement to the substantial injury of plaintiff.

ARGUMENT.

I. The Owner-Lessor of a Theater Has a Property Interest Protected Under Section Four of the Clayton Anti-Trust Act.

Section Four of the Clayton Anti-Trust Act, 38 Stat. 731 (1914), 15 U. S. C. § 15, provides:

> "That any person *who shall be injured in his business or property* by reason of anything forbidden in the anti-trust laws may sue therefor . . ." (Emphasis added.)

A. A Percentage Rental Agreement Creates a Property Right.

Under its lease with Warner Bros. Pictures, Inc., plaintiff had a contractual right to receive rental payments. These rentals were composed of two elements: (1) a minimum amount, plus (2) a percentage of lessee's gross receipts over a stated figure. This contractual right to a percentage of the lessee's gross receipts is an absolute property right of the lessor. That this is clear is indicated by *Hempstead Theater Corp. v. Metropolitan Playhouses*, 308 N. Y. 717, 124 N. E. 2d 355 (1954). Plaintiff there had leased a theater under a percentage lease. The lessee had recovered a judgment based on a treble damage anti-trust claim, and plaintiff sued for the lease percentage of the recovery. A motion to dismiss had been denied and the Appellate Court affirmed, since it felt that the lessor was entitled to some percentage of the lessee's recovery.

Furthermore, the Melrose Realty Company's rights to receive payments of a minimum rental and a percentage of receipts cannot be considered as unrelated. Undoubtedly, the landlord agreed to a lower minimum rent on the prospect of sharing in the receipts of a thriving business.

The case of *Camrel Co., Inc. v. Paramount Film Distributing Corp.*, CCH Trade Reg. Rep. 1944-47 Ct. Decisions ¶ 57,233 (S. D. N. Y., 1949) is squarely in point.* There plaintiff had leased property for a rental consisting of a minimum amount with additional rentals on a percentage basis. Plaintiff had been paid his minimum rentals, plus some percentage rentals, but he alleged that the defendants' unlawful conspiracy had diminished the receipts of his lessee, thus lowering his percentage rental rights. The court denied a motion to dismiss, holding that plaintiff had alleged injury to a property right which the anti-trust laws would protect. The court also held that plaintiff's injury was compensable within the scope of the Sherman and Clayton Acts. Thus, under the same facts and upon the same procedural attack (Motion to Dismiss), the Southern District of New York has taken a position exactly opposite to that taken by the court below.

The Melrose Realty Company has suffered injury to a property interest even though its lessee had paid its minimum rentals, so that the minimum rental contract was not breached. It has never been held that the anti-trust laws protect only parties whose contracts have been breached. Indeed, courts have recognized as protectable under the anti-trust laws other interests which had been injured although no contract had been breached. In *Vines v. The General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir., 1948) a salesman alleged that he had been denied the right to solicit business by a reclassification system which violated the anti-trust laws. The lower court dismissed the complaint, but the Second Circuit Court of Appeals reversed, stating:

> ". . . It has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him."

Similarly in *Moore v. Backus*, 78 F. 2d 571 (7th Cir., 1935), *cert. den.*, 296 U. S. 640 (1935), a stock speculator had sold

* This case is reprinted in full as an Addendum to this brief, on page 17.

short in the hope that the securities market would drop. Defendants cornered the market, thus maintaining a higher price level. It was held that plaintiff's expectation that prices would fall was a property interest which had been injured.

It has also been held that the right to enter a business is a property right protectable under the anti-trust laws in *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254 (2d Cir., 1908) and *Goldman Theaters v. Loew's, Inc.*, 69 F. Supp. 103 (D. C. Pa., 1946), *affd.*, 164 F. 2d 1021 (3d Cir., 1948), *cert. den.*, 334 U. S. 811 (1948); *cf. Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946); *Story Parchment Co. v. Patterson Paper Co.*, 282 U. S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927). In these cases, plaintiffs had only a hope that their new businesses might be profitable, yet this expectation was considered a property interest to which the anti-trust laws gave protection.

In the instant case, Melrose Realty Co., Inc. already had a contract giving it the right to a percentage of gross receipts. Clearly, this is a right entitled to greater protection than that of an entrant into a new business.

Furthermore, courts have protected, as property interests, salesmen's rights to commissions compellingly similar to plaintiff's right to percentage rentals. In *McWhirter v. Monroe Calculating Machine Company*, 76 F. Supp. 456, 460 (W. D. Miss., 1948) plaintiff alleged a restraint of trade. The Court stated:

> ". . . As a result thereof, this plaintiff, as manager of a competing company and who received his compensation through commissions, was prevented from making sales and was thereby damaged. I think the plaintiff comes within the provisions of the Act and is entitled to maintain his action."

The cases of *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942) and *Klein v. Sales Builders, Inc.*, 1950-51 Trade Cases ¶ 62,600 (D. C. Ill., 1950) also allow salesmen to sue a violator of the anti-trust laws for injury to their right to solicit business.

In these cases the companies by which the salesmen were employed had breached no contract, for commissions were not payable until sales were consummated. Yet the courts held that the salesmen's right to solicit business was a property interest which the anti-trust laws protected against restraints of trade. Analogously, a lessor under a percentage lease has a property interest entitled to protection against a conspiracy which constricts the receipts upon which his rental is to be paid.

B. A Lessening of Percentage Rentals Resulting from an Illegal Conspiracy Is a Direct and Compensable Injury.

Defendants' illegal conspiracy has resulted in a decrease in the gross receipts of plaintiff's lessee, Warner Brothers Theatres, Inc. This has caused the plaintiff direct, independent, pecuniary loss by reason of: (1) the reduced rentals received under the percentage lease; and (2) the depreciation in value of plaintiff's property as a result of reduced earnings by the lessee.

The court below, following its own dictum in the case of *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa., 1953), held that plaintiff was not a "person injured in his business" within the statutory definition. And the dictum of the same court in the *Harrison* case had declared that a landlord's injuries were "remote, uncertain and insubstantial." In so deciding, the court completely ignored *Camrel Co., Inc. v. Paramount Film Distributing Corp., supra.* That decision was on all fours with the *Harrison* case. There the defendants had moved to dismiss

the complaint, and the motion was denied. The court specifically held that a landlord's injuries under a percentage lease were direct and protectable under Section Four of the Clayton Anti-Trust Act.

It is not clear why plaintiff's injuries were considered too "remote" by the court below. This could mean either that there is no direct causal connection between defendants' acts and plaintiff's injury, or that defendants' actions did not result in the breach of any contract. If remoteness is measured in terms of causal connection, defendants' conspiracy directly resulted in lowering the lessee's gross receipts and therefore necessarily, in reducing plaintiff's rentals based on a percentage of these gross receipts. Plaintiff's injuries here are as directly affected and certainly are *less* "remote, uncertain and insubstantial" than the potential profits of an entrant into a new business, or the potential commissions of a salesman on sales which he *might* have made but for the illegal conspiracy.

Nor is this injury too remote because no breach of contract occurred. As indicated above, no breach of contract is required to prove an injury under the Sherman or Clayton Act. In this connection, the cases cited above concerning decreased salesmen's commissions and injuries to persons entering a new business are relevant. Neither of these classes of injuries involves a breach of contract. Yet both of these situations have been held to involve injuries sufficiently direct so that damages are recoverable.

See, also, Comment, "*Third-Party Recovery for Injury to Economic Interests*", 21 U. of Chi. L. Rev. 709 (1954) which concludes that a lessor's injury under a percentage lease is direct and compensable.

II. The Harrison Case Is Neither Binding Upon Nor Decisive of the Instant Case.

A. The Statements in That Decision Are Dictum, and Therefore Not Binding.

Defendants have relied heavily on the case of *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd.*, 211 F. 2d 405 (3d Cir. 1954), *cert. den.*, 348 U. S. 828 (1954). In that case, plaintiff was the owner-lessor of a theatre. She alleged a conspiracy in restraint of trade among the defendants, which lessened her rentals under a lease providing for a minimum rent plus a percentage of receipts. The case was tried, and the jury returned a verdict for the defendants, finding that no illegal conspiracy existed.

The above cited opinion was written on Motions for Judgment n.o.v. and for a New Trial. The District Court denied the motions and expressly upheld the jury verdict. Since this ruling decided the motions against the plaintiff, it was unnecessary to consider whether the landlord was a person "injured in his business or property" under the Clayton Act. Nevertheless, the Court went on to express its belief that plaintiff's injuries under the percentage lease were too remote to sustain a recovery. The decision was affirmed on appeal by the Circuit Court of Appeals for the Third Circuit, 211 F. 2d 405 (1954).

Since the statements of the District Court concerning a landlord's status as a person injured under the Clayton Act were not necessary to its decision, they are *obiter dictum*, and in no way binding in the instant case. This was recognized by Judge Kirkpatrick in the *Harrison* opinion, 115 F. Supp. 312, 315 (1953), when he said:

> "In view of the verdict, it is not strictly necessary to the disposition of the plaintiff's motions to pass upon the point made by the defendants that the plaintiff is not a person 'injured in his business or property' within the meaning of the Anti-Trust laws. . . ."

B. The Harrison Dictum Should Not Be Adopted.

In the *Harrison* case, the Court stated that the plaintiff-lessor had no property interest, and in any case, any injury was too remote to protect. The Court felt that since the minimum rental had been paid, the lessor's right to a percentage of receipts was "nothing more than a hope that it would ever be earned." As indicated at pages 6 and 7 of this brief, the lessor's profit expectations were no less certain than those of salesmen to commissions, or of new entrants in a business to expected profits; yet these latter "hopes" were held to be property interests.

In discussing the remoteness question, the Court mentioned those cases holding that stockholders and creditors of a corporation are too remotely injured for Sherman and Clayton Act protection. However, these parties are protected by corporate recovery, and to allow such suits would involve a multiplicity of action not present in the instant case.

The Court also emphasized that plaintiff had a contractual "right" only to the minimum rental, which had already been paid. But, as shown on pages 5 and 6 of this brief, there is no requirement that a party suffer a breached contract to be directly injured under the anti-trust laws.

Thus, the *dictum* in the *Harrison* case cannot be sustained on any logical grounds. All considerations of public policy indicate that the plaintiff has suffered just such a loss as that against which the Sherman and Clayton Acts were intended to protect. These considerations are well summarized in a Comment, "*Third Party Recovery for Injury to Economic Interests—a Common Law Problem in Interpreting the Sherman Anti-Trust Laws*", 21 U. Chi. Law Review, 709-710 (1954), which considered the *Harrison* case fully. The Comment concluded:

> "As to the first contention [that there was no injury to business or property] . . ., it should be observed that Mrs. Harrison accepted a lower rental, as

well as a share of the risks of the business, in return for expectations of a percentage of the receipts. *But in accepting some part of the business risks, she would appear to be entitled to rely on statutory remedies whose purpose is to reduce such risks.* Although, in the court's words, Mrs. Harrison's expectation of sharing any receipts may have been no more than a 'hope', *it would seem to be a hope which should not be impaired without remedy, by violations of law.* . . . Moreover, the no 'injury in his business or property' argument appears to be in conflict with the policy implicit in the Supreme Court's decision in *Bigelow v. RKO Radio Pictures, Inc.*—that *courts should not deny relief under the Acts where any injury can be proven.* . . .

[And with reference to the remoteness of injury problem] . . . the divergence in result between the stockholder-creditor cases and the sales agent cases is not overly disturbing. To permit individual shareholders' suits would be to disregard one of the basic purposes of the corporate entity. . . . Further, the number of shareholders and creditors makes the multiplicity of suit problem almost insurmountable. These elements are not present in the sales agent situation, and may justify the difference in result. But there is no corporate entity, nor is there a serious multiplicity of suit problem in the *Harrison* case; thus it would seem more logical that the *Harrison* result accord with that of the sales agent cases, rather than that of cases involving stockholders or creditors." (Emphasis added.)

C. The Harrison Rule Does Not Apply Where the Tenant Is a Co-Conspirator.

Whether the *Harrison* rule is considered valid or not, it can have no application to the present case. The only justification for that rule is to avoid multiplicity of suits.

The court in the *Harrison* case feared that allowing suits by lessors who had no business transactions with the defendants would unduly harass motion picture distributors and exhibitors. The court pointed toward judicial refusal to allow corporate stockholders to sue as indicative of the policy against multiplicity. However, as pointed out above, the positions of a lessor and that of stockholders are completely distinguishable.

In any case, the policy against multiplicity has no weight except where a representative party is in a position to sue. Thus, in *Gerli v. Silk Association of America*, 36 F. 2d 959 (S. D. N. Y., 1939) a stockholder was not allowed to sue where no reason was assigned for the failure of the corporation to bring suit. And in *Westmoreland Asbestos Co. v. Johns-Manville Corporation*, 30 F. Supp. 389 (S. D. N. Y., 1939) a lessor's suit was dismissed where such a suit had been joined with that of the lessee. It would appear that the *Westmoreland* decision stands for the proposition that where action by one injured party will of necessity encompass the rights of another injured party, the latter party is sufficiently protected. The *Westmoreland* lessor would have been protected by its lessee's recovery, since the lessor could claim a share of the lessee's judgment. *Hempstead Theatre Corp. v. Metropolitan Playhouses*, 308 N. Y. 717, 124 N. E. 2d 355 (1954).

There can be no multiplicity problem where the lessee of a theatre is a co-conspirator in an illegal restraint. In the *Harrison* case, the lessee at the time of the suit was actually protesting against defendants' illegal actions and was therefore in a position to bring suit himself. But in the instant case, *plaintiff's lessee is a member of the illegal conspiracy.* Warner Bros. Theatres, the lessee of the Yorktown Theatre, is a wholly owned subsidiary of Warner Bros. Pictures Distributing Corp. and both the lessee and its parent are named in the complaint as defendants and parties to the conspiracy. As a co-conspirator, the lessee

is in no position to bring its own suit. Thus, if the lessor cannot sue in its own right, there is no way by which its property interests can be protected.

Judicial authorities have distinguished the case where a primary party is a co-conspirator, and in these cases have allowed secondary parties to sue. Thus, in *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 264 (1917) a stockholder derivative suit was dismissed, since the court felt that the decision on whether or not to bring such a suit was within the discretion of the corporate board of directors. The court stated that it would not interfere with corporate discretion, except ". . . where the wrongdoers controlled the corporation. . . . In the instant case there is no allegation that the United Copper Co. is in the control of the alleged wrongdoers. . . ." But where a corporation is a co-conspirator, a stockholder derivative suit is allowed. *Franchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F. 2d 731 (2d Cir. 1953); *cf. Corey v. Independent Ice Co.*, 207 Fed. 459 (D. Mass. 1913).

In similar fashion, a lessor must have the right to attack an illegal restraint of trade when its lessee is a member of the conspiracy. If that were not so, there would be no way for the lessor to remedy its palpable injury. And perhaps more important, no party with standing to bring a private suit could safeguard the public interests against illegal conspiracies in restraint of trade.

The policy behind allowing private action under the Sherman and Clayton Acts is two-fold: to compensate persons injured by an illegal conspiracy, and to aid in the enforcement of the public interest in keeping commercial enterprise free from collusive monopolization. To deny an injured lessor the right to sue, at least where his lessee is

a co-conspirator, is to nullify both policies. It guarantees to an illegal conspiracy of motion picture distributors immunity against private attack if the theater lessee can be persuaded to join in the restraint. And it denies any remedy to a party directly injured by that restraint.

It is submitted that a theater lessor has a direct and independent action against any illegal conspiracy which injures his rental rights, in any case. But neither the *Harrison* rule, nor any considerations of public policy can deny a lessor the right to protect itself and the public interest when its own lessee has agreed to an illegal restraint of trade.

III. Summary.

1. A party leasing property for a minimum rent plus a percentage of gross receipts has a property interest protested by the Sherman and Clayton Anti-Trust Acts.

(a) The lessor's right to receive percentage rentals is as much a part of the rental contract as the claim for the minimum rent, and both represent property rights.

(b) Damages to such percentage rentals are not too remote to be actionable under the Anti-Trust laws.

(c) A person injured by a conspiracy in restraint of trade can maintain an action even though such injury does not result from a breach of any contractual relation.

2. The lessor's property right to a percentage of its lessee's gross receipts has been directly injured by a conspiracy which decreased those receipts.

3. The *Harrison* case did not hold otherwise. In that case the jury had found that no conspiracy existed, so that the court did not have to decide whether the lessor had a property interests protected by the Clayton Act. Therefore, the remarks in that decision concerning the lessor's

status under the Clayton Act are *obiter dictum* and not decisive of the issue.

4. The present case is distinguishable from the *Harrison* case. In the *Harrison* case, the lessee was in a position to sue on behalf of itself and the lessor. In the instant case, the lessee is a party to the conspiracy.

5. Therefore, if the lessor cannot bring this action, it will have no remedy for its injury.

6. Furthermore, if the lessor cannot bring an action where its lessee is a co-conspirator, no private party will be able to protect the public interest in preventing restraints of trade. Such a ruling would subvert the policy of the Sherman and Clayton Acts to encourage private parties to aid in protecting the public interest.

On the basis of the foregoing arguments and legal authorities, it is respectfully submitted that the judgment of the lower court dismissing the Complaint must be reversed.

Respectfully submitted,

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Attorneys for Appellant.

Of Counsel:

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ADDENDUM.

OPINION.

In the Case of Camrel Co., Inc. v. Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Warner Brothers Pictures, Inc., R. K. O. Radio Pictues, Inc., Twentieth Century-Fox Film Corporation, Universal Pictures Company, Inc., Columbia Pictures Corporation, United Artists Corporation.

United States District Court, Southern District of New York. Civ. 24-335. March 30, 1944.

For plaintiff: Samuel B. Ohlbaum, New York City.

For defendant Columbia Pictures Corp.: Schwartz & Frolich, New York City (Louis D. Frolich, Herbert P. Jacoby, Lawrence C. Gibbs, of counsel).

(Motion to Dismiss)

Bright, D. J.: All of the defendants, except Metro-Goldwyn-Mayer Distributing Corporation, move under Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the complaint for failure to state a claim upon which relief can be granted.

(Nature of Plaintiff's Interest)

Plaintiff has been the owner of the Cameo Theatre in Jersey City, New Jersey, since October 25, 1938. It does not, however, operate it. It purchased the theatre on that date subject to a lease with the Rosyl Amusement Corporation, which ran for five years from October 1, 1938, with a rental of $13,000 per year for the first three years, and $14,000 for the remaining two years, with additional rentals on a percentage basis. Prior to the expiration of that lease,

and on June 22, 1942, the lessee negotiated a new lease with plaintiff for ten years from July 1, 1942, at $14,000 a year for the first five years, $15,000 a year for the next four, and $15,500 for the tenth year, with like additional rentals on a percentage basis.

(Basis of Action)

This action is brought under the Sherman and Clayton Anti-Trust Acts (15 U. S. C. A. § 1 et seq.) and their amendments, to recover treble damages alleged to have been sustained since October 25, 1938, plus reasonable attorneys' fees and costs of the suit, and to enjoin the defendants from alleged monopolies and restraints of interstate trade and from leasing feature pictures in Jersey City and other adjacent cities in Hudson County, New Jersey, except upon a local competitive basis. It is alleged, among other things, that because of defendant's illegal restraint and agreements, competition by the operator of plaintiff's theatre has been prevented because it has not been able to obtain enough first class pictures for exhibition to operate the theatre successfully, it has been forced to exhibit feature pictures previously exhibited or rejected by defendants' affiliates, competitors of plaintiff's, and to maintain admission prices higher than warranted by the quality of the entertainment offered to it by the defendants, has been prevented from showing any feature pictures except after first run clearance in Jersey City, and where defendants' affiliates operate second run theatres in the territory mentioned, except after second run clearance.

(Defendants' Objection)

That the complaint is sufficient in its allegations with respect to violations of the Sherman and Clayton Acts and in its statement of any cause of action by reason thereof, except insofar as damages are concerned, is not questioned. The defendants' objection is placed upon the

ground that plaintiff is not entitled to maintain the action except for injury and damage personal to itself, and that the damage pleaded is too remote and speculative to permit a recovery.

(Damages Sufficiently Alleged)

The damages which plaintiff claims by reason of the alleged illegal practices of the defendants are that the rental and market value of its theatre have been and are materially injured and reduced, and plaintiff has been deprived of obtaining additional income from its lease under the percentage provisions thereof; that the true rental value which could readily be obtained, were it not for the practices of the defendants, would be at least $30,000 per year. The other damages, if any, mentioned in the complaint, would seem to be those of the operator of the theatre.

I think plaintiff has alleged sufficient to withstand a mere formal motion, particularly where the defendants must be taken as admitting the facts alleged. *Dioguardi v. Durning*, 139 F. (2) 774-775; *Meeker v. Lehigh Valley R. Co.*, 183 Fed. 548-551; *Hart v. Keith Exchange*, 262 U. S. 271-274. By Section 15 of Title 15 U. S. C. A., "Any person who shall be injured in his business or property" may bring an action similar to this. Plaintiff clearly alleges that it has been injured in its property. Whether or not the proof upon the trial will show recoverable damages is another question. It is too early in the litigation to pass upon that. *Hart v. Keith Exchange*, supra.

(Motion to Dismiss Denied)

The motion to dismiss is denied.

Appendix.

AMENDED COMPLAINT.

(As Amended by Stipulation of Counsel.)

To the Honorable, the Judges of the Said Court:

The plaintiff above-named brings this civil action against the defendants above-named and complains as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business located at 1518 Walnut Street, Philadelphia, Pennsylvania.

2. The defendant, Loew's, Inc., is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 1540 Broadway, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 1233 Summer Street, Philadelphia, Pennsylvania.

3. The defendant, Paramount Film Distributing Corporation, is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 1501 Broadway, New York City, New York, and is engaged in the business of distributing motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries, and has an agent and transacts business in the Eastern District of Pennsylvania and has an office in said District and State at 248 North 12th Street, Philadelphia Pennsylvania. (As amended by Stipulation of Counsel.)

4. The defendant, R. K. O. Radio Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware having its principal place of business at 1270 Sixth Avenue, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 250 North 13th Street, Philadelphia, Pennsylvania.

5. The defendant, Twentieth Century-Fox Film Corporation, is a Corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 302 North 13th Street, Philadelphia, Pennsylvania.

6. The defendant, Columbia Pictures Corporation, is a Corporation organized and existing under the laws of the State of New York, having its principal place of business at 729 Seventh Avenue, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 302 North 13th Street, Philadelphia, Pennsylvania.

7. The defendant, Warner Theatres, Inc., (formerly known as Warner Bros. Theatres Inc.) is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York City, New York, and is engaged in the business of exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania and has an office in said District and State at 1028 Market Street, Philadelphia, Pennsylvania. (As amended by Stipulation of Counsel.)

8. The defendant, Warner Bros. Pictures Distributing Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a Corporation organized and existing under the laws of the State of New York, having its principal place of business at 321 West 44th Street, New York City, New York, and is engaged in interstate commerce in the business of distributing the motion pictures produced by Warner Bross. Pictures, Inc., and its subsidiary and associated companies and has an agent and transacts business in the Eastern District of Pennsylvania and has an office in said district and State at 230 North 13th Street, Philadelphia Pennsylvania.

9. The defendant, Stanley Company of America, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a Corporation organized and existing under the laws of the State of Delaware, and is engaged in the business of exhibiting motion pictures in interstate commerce, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 1028 Market Street, Philadelphia, Pennsylvania.

10. The defendant, Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a Corporation organized and existing un-

der the laws of the State of New York having its principal place of business at 321 West 44th Street, New York City, New York, and is engaged in interstate commerce in the business of exhibiting motion pictures and, among other things, operates and acts as booking agent for the motion picture theatres owned or operated by the exhibition interests of the said Warner Bros. Pictures, Inc., and its subsidiary and associated companies and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 1028 Market Street, Philadelphia, Pennsylvania. Said defendant is now known as Stanley Warner Management Corporation.

(As amended by Stipulation of Counsel.)

11. The defendant, Universal Corporation, is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 445 Park Avenue, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries, and has an agent and transacts business in the Eastern District of Pennsylvania and has an office in said District and State at 251 North 13th Street, Philadelphia, Pennsylvania.

(By Stipulation of Counsel the action has been dismissed as to this defendant.)

12. The defendant, Universal Film Exchanges, Inc., is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 445 Park Avenue, New York City, New York, and is engaged in interstate commerce in the business of distributing the motion pictures produced by the Universal Corporation, its subsidiary and associated companies and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District and State at 251 North 13th Street, Philadelphia, Pennsylvania.

13. The defendant, United Artists Corporation, is a Corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 729 Seventh Avenue, New York City, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries and has an agent and transacts business in the Eastern District of Pennsylvania and has an office in said District and State at 302 North 13th Street, Philadelphia, Pennsylvania.

13(a). The defendant, Dante Iacampo, is an individual residing in Glenside, Montgomery County, Pennsylvania, in the Eastern District of Pennsylvania, and was formerly engaged in the business of exhibiting motion pictures at the Glenside Theatre in said District and State.

14. The defendant, Glenside Theatre Corporation, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at Mount Carmel and Keswick Avenues, Glenside, Pennsylvania, in the Eastern District of Pennsylvania, and is engaged in the business of exhibiting motion pictures at the Glenside Theatre in said District and State.

15. Plaintiff is and has been since June 22, 1934 the owner of the Yorktown Theatre, which is located in Cheltenham Township, Montgomery County, Pennsylvania.

16. On September 7, 1933, a lease agreement was entered into by and between Charles Kahn and Ruth G. Kahn, his wife (predecessors in title to the plaintiff), as Lessors and Warner Bros. Theatres, inc. (now known as Warner Theatres, Inc.), as Lessee, under the terms of which the Lessee agreed to operate the Yorktown Theatre, and to exhibit pictures therein and to pay as rental for such theatre the minimum sum of $6,000.00 per annum plus 15% of all paid admissions (after deducting all Federal, State

and Municipal or other Governmental Taxes or similar Excise Taxes imposed on admissions) as well as any other receipts accruing to the benefit of the theatre in excess of $40,000.00 per annum. Said lease was for a term of ten years from thirty days after the date upon which such theatre was opened to the public, namely, September 5, 1934. Thereafter the lease was renewed by the parties by various extension agreements and will expire on November 30, 1965.

(As amended by Stipulation of Counsel.)

17. From the opening of the Yorktown Theatre until on or about November 30, 1950, the Yorktown Theatre enjoyed a key-run showing, that is to say, that pictures produced and distributed by the various defendants who were in the business of producing and distributing pictures were exhibited at the Yorktown Theatre twenty-eight days after the pictures had been exhibited at first-run theatres in the City of Philadelphia.

18. On or about January 12, 1949, the defendant Iacampo filed a Complaint (Docket No. 9272) in the District Court for the Eastern District of Pennsylvania against the other defendants, except Glenside Theatre Corporation, seeking the right to have a key-run status established for his Glenside Theatre.

18(a). On or about November 14, 1950 a Stipulation of Dismissal of said suit was joined in both by counsel for the plaintiff and the defendants named therein, pursuant to an agreement made by and among the parties to such litigation. The terms of said agreement are not known to the plaintiff, but shortly thereafter Yorktown Theatre was forced to exhibit pictures on a day and date basis with the Glenside Theatre, that is to say that the same picture was required to be shown at both the Yorktown and the Glenside on the same day and for the same length of time without any choice of pictures being afforded to either the-

atre other than the picture which is required to be shown at both theatres on the same day and date.

19. As a result of the establishment of the policy by the defendants of requiring the same picture to be shown at both theatres, namely, the Yorktown and the Glenside, on the same day and date, the gross receipts of the Yorktown Theatre have been seriously reduced and the plaintiff has been seriously injured by virtue of the consequent reduction in the amount of percentage rentals to which it is entitled under the terms of the lease of the Yorktown Theatre. In addition, the value of plaintiff's realty has been substantially impaired as a result of defendants' unlawful acts.

20. The Yorktown Theatre is located on Old York Road (Route 611) and on Church Road (Route 73) both State Highways and main thoroughfares for theatre-going people in the northern portion of the City of Philadelphia and the neighboring portion of Montgomery County; it contains seating accommodations for 850 patrons and parking accommodations for 600 cars. It is a modern theatre in every sense of the word. In contrast, the Glenside Theatre is not located on any main thoroughfare; it is an old theatre remodeled and has grossly inadequate parking accommodations.

21. The motion picture business consists of three phases, to wit, (1) production of pictures; (2) distribution of pictures to exhibitors, and (3) exhibition of pictures.

22. The motion picture business in all its phases constitutes a part of interstate commerce.

23. The defendants produce and distribute more than ninety per cent of the first class feature motion pictures produced in the United States.

24. No motion picture exhibitor can successfully operate a first-run feature motion picture theatre or a first-

run neighborhood motion picture theatre in the United States without being supplied with pictures produced or distributed by the defendants.

25. The defendants, Paramount Pictures, Inc., Loew's, Incorporated, R. K. O. Radio Pictures, Inc., Warner Bros. Pictures, Incorporated and Twentieth Century-Fox Film Corporation either directly or through subsidiary corporations, own or lease, and operate a large number of motion picture theatres, including first-run feature motion picture theatres, in various parts of the United States, and in a large number of said theatres, said defendants exhibit their own productions and also pictures produced and licensed for exhibition by other defendants.

26. The defendants have unlawfully agreed and conspired with each other, to the loss and detriment of the plaintiff and to the public, by reason of the fact that the agreement referred to in paragraph 18(a) has suppressed and stifled competition between the Glenside Theatre and the Yorktown Theatre.

27. This action is brought under Sections 4 and 16 of the Act of Congress of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", as amended and supplemented (15 USCA 15, 26) commonly known as the Clayton Act and Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (15 USCA 1), said Act being commonly known as the Sherman Anti-Trust Act, and the Act of Congress of June 19, 1936 (15 USCA 13) commonly known as the Robinson-Patman Act.

28. As a result of the above described wrongful acts and conduct of defendants, plaintiff claims that during the period from November 30, 1950 to date, it has suffered loss and damages in the amount of $125,000.00, and will con-

tinue to suffer additional losses and damages so long as such wrongful acts continue.

WHEREFORE, plaintiff prays:

(a) That summonses be issued and directed to each of the defendants commanding them to appear and answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

(b) That the defendants be ordered to pay to plaintiff threefold the amount of loss and damages sustained by plaintiff, together with the full cost of this suit including as a part thereof a reasonable attorney's fee for the services of plaintiff's attorneys.

(c) That the defendants and each of them be ordered to discontine the wrongful acts and conduct herein complained of.

(d) That the plaintiff be afforded such further relief as the Court shall deem just and proper.

STRADLEY, RONON, STEVENS & YOUNG,

By: DAVID H. ROSENBLUTH,
Attorneys for Plaintiff.